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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 28, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992--Tier Buy Through Prohibitions
MM Docket No. 92-262

Dear Ms. Searcy:

Please find enclosed on behalf of the National Association of Telecommunications Officers and Advisors, et. al., an original and 11 copies of Reply Comments of the National Association of Telecommunications Officers and Advisors, et. al. filed in MM Docket No. 92-262.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,



Bruce A. Henoch

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)

MM Docket No. 92-262

Tier Buy-through Prohibitions)

TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

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Date: January 28, 1993

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SUMMARY

The Local Governments believe that the tier buy through provision is a vital piece in the consumer protection scheme developed by Congress in the 1992 Cable Act. It is important that the provision be applied as broadly as possible. Thus, the Commission's rules should be tailored so as to allow exceptions and waivers to the provision only in cases where the cable operator is truly incapable of complying without major expense. Further, any exception for small cable systems should only apply to small, independently-owned operators, and should not be applied automatically.

In addition, the Commission should recognize that there is a wide variety of available technology allowing cable systems to comply with the buy through provision at reasonable cost. Converters and trapping systems are both reasonably-priced and widely-available technologies, and other technologies are also available at low cost.

Finally, the Local Governments believe that cable operators should be able to package and discount programming, but only if these offers are available to all subscribers.

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ASSOCIATION OF COUNTIES

The National Association of Telecommunications
Officers and Advisors, the National League of Cities,
the United States Conference of Mayors, and the National
Association of Counties (collectively, the "Local
Governments") submit these reply comments in the
above-captioned proceeding.

I. INTRODUCTION

The Local Governments in their comments in this
proceeding urged the Commission to adopt rules ensuring
that the requirements of the buy through prohibition are
not rendered meaningless by allowing large numbers of
cable operators to avoid compliance. The Local

Governments stated that the Commission should ensure that only those systems that are truly incapable of complying without great expense are excepted from the provision during the initial ten year exception period. A number of cable operators urged the Commission to apply the exception and waiver provisions much more broadly. This approach would effectively nullify the purpose of the statute and contravene Congressional intent.

The buy through provision is a critical part of the consumer protection scheme created by the 1992 Act. This provision is intended to prevent cable customers from being forced to spend money to purchase programming tiers that they do not want in order to receive the programming that they do want. This goal can be achieved only if cable operators are required to adhere to the statute. Thus, Local Governments in these reply comments urge the Commission to ensure that the provision applies to all parties to whom it was intended to apply: cable operators who are capable of complying at a reasonable cost. There should be no automatic exception for systems under any circumstances.

In addition, the Commission should recognize that there is a variety of technologies currently available that enable cable operators to comply at a reasonable

cost. Finally, while cable operators should be allowed to offer program packages and discounts, such offers should be available only if the same prices, terms, and conditions are offered to all subscribers.

II. DISCUSSION

A. There Should Be No Automatic Exception For Small Cable Operators.

Several commenters stated that the Commission should provide an automatic exception for small cable operators. For example, the Consortium of Small Cable Operators ("COSCO")¹ believes that systems with less than 10,000 subscribers should be given a permanent exemption from the provision.² The Coalition of Small System Operators ("CSSO")³ believes that all systems of 1,000 subscribers or less should be given an automatic 10 year exception from the provision, and that there should be an automatic and indefinite waiver for any system of less than 1,000 subscribers that does not have addressable technology in place at the end of the

¹ Comments of Consortium of Small Cable Operators, filed January 13, 1993.

² COSCO goes on to say that, in the absence of a permanent exemption, such systems should be given a waiver upon a good faith certification that compliance would impose unreasonable financial burdens that would result in increased rates.

³ Comments of Coalition of Small System Operators, filed January 13, 1993.

10 year period. According to CSSO, this waiver should be automatic, requiring no action on the part of the operator to become effective.⁴

The Local Governments believe that the Commission should not adopt any such automatic exceptions or waivers for small systems. As the Local Governments stated in their comments, the conditions under which an operator can qualify for the 10-year exception found in Section 623(b)(8)(B) should be narrowly drawn so as to apply only to systems that are truly incapable of complying without major or costly modification. In proceedings to determine whether a waiver should be granted under Section 623(b)(8)(C), the Commission should consider very carefully the financial impact on the operator's overall costs and profitability and should reject waivers where only a modest increase in its rates may be warranted to comply with the buy through provision.

Many small systems are part of large multiple system operators ("MSOs") that have a wide range of resources that may be invested in small systems. While it may be true that there are independent small

⁴ See also comments of the National Cable Television Cooperative ("NCTC"). NCTC urges the FCC to exempt any system of less than 5,000 basic subscribers from complying with the provision.

operators for whom compliance may be difficult without expensive upgrades, many small systems are owned by large MSOs. These systems have access to the resources to implement the upgrades necessary to bring the systems into compliance with the provision. As discussed in their comments, the Local Governments believe that to reduce the administrative burden on small cable systems, there should be an exception only for systems that have 1,000 or fewer subscribers, but this exception should not be automatic. First, such rules should not apply to any cable system that (i) serves a total of more than 1,000 subscribers in multiple franchise areas, even if one or more of the franchise areas has fewer than 1,000 subscribers; and (ii) is directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, and the cable systems directly or indirectly owned by such cable operator serve a total of 45,000 or more customers. This would ensure that any such rules would benefit only those systems that are truly in need of an exception. Second, if a small system believes it qualifies for a small system exception, it should be required to certify to the local franchising authority that it qualifies. The exception should last for 10 years or until the number of the

system's subscribers rises significantly over 1,000, whichever occurs first.

B. The Commission's Rules Should Recognize
That Technology To Comply With The Buy
Through Provision Currently Exists.

A number of commenters suggested that compliance with the buy through prohibition is difficult because of technological limitations, and that operators should therefore be granted liberal exceptions or waivers from the provision. However, implementation of the statute in this way would effectively nullify the statute, which would only have the effect of harming the consumers that the statute was designed to protect. For example, the Community Antenna Television Association ("CATA")⁵ and National Cable Television Association ("NCTA")⁶ stated in their comments that only "fully addressable" systems or systems that are "100 percent addressable" should be required to comply with the provision. This position is unnecessarily overbroad. It is our belief that there are virtually no cable systems in existence that are "fully addressable." Virtually no systems in existence provide full addressability for every channel offered,

⁵ Comments of The Community Antenna Television Association, Inc., filed January 13, 1993.

⁶ Comments of the National Cable Television Association, Inc., filed January 13, 1993.

as such a configuration would be inefficient and unnecessary. Further, compliance is possible for most systems by using a variety of technologies that are currently available at a reasonable cost.⁷ There simply is no reason that only fully addressable systems should be required to comply with this law.

Similarly, Time Warner stated in its comments that compliance with the provision is "impossible" where full addressability has not been deployed system-wide.⁸ As noted above, this statement is simply untrue. Time Warner argues only that compliance would be more expensive; it does not show why compliance would actually be "impossible." In fact, there is no plausible reason why a cable operator cannot comply with the provision to the fullest extent that it is capable. The fact that part of the system is not capable of complying should have no effect on the obligation of the operator with respect to the rest of the system. A contrary rule would have the illogical and potentially

⁷ For example, cable operators could utilize various positive or negative forms of trapping systems for controlling access to pay programming. This could allow flexibility in the assignment of channels, without the customer having to purchase an intermediate tier of service. Such systems are widely in use, and the cost of the components for the system is generally quite low.

⁸ Comments of Time Warner Entertainment Co., L.P., filed January 13, 1993.

discriminatory effect of encouraging cable operators to implement upgrades in the system as slowly as possible -- or to purposely upgrade only select portions of a franchise area, possibly discriminating against some areas in favor of the "cream" only -- since the inability of part of the system to comply with the provision would excuse the entire system from complying with the law throughout the 10 year exception period.

In addition, several commenters stated that the only technologies available to implement the prohibition are trapping systems and set-top converters.⁹ These commenters go on to describe the drawbacks of these two types of technologies, and conclude that these drawbacks impede compliance. The Local Governments disagree with this conclusion. While it is true that there are some drawbacks to these technologies, the largest single concern associated with converters cited by the cable operators remains the cost. However, the cost of providing converters is relatively low, especially in light of the substantial benefits that will flow to consumers from the resulting flexibility offered by these devices. Further, to the extent that costs exist,

⁹ See, e.g., comments of Cole, Raywid & Braverman, filed January 13, 1993; National Cable Television Association, Inc., filed January 13, 1993; and Cox Cable Communications, filed January 13, 1993.

the operators will likely recover their investment as permitted by the rate regulation provisions of the 1992 Act.

With regard to the purported drawbacks in existing technologies cited by these commenters, it is important for the Commission to recognize that there are other technologies available in addition to set-top converters and trapping systems that would allow a cable system to comply with the provision. For example, internal and external decoders utilized with cable-ready television sets would make the current set-top converter unnecessary, thus providing addressability without many of the alleged drawbacks of set-top converters or traps. Given that the technological limitations cited by the commenters are neither accurate nor complete, the FCC should not grant automatic 10 year exceptions from compliance to any systems based on the unsupported assertion that technological limitations prevent reasonable compliance. Most systems are capable of complying with the provision at a reasonable cost. The burden should therefore be on the cable operator to present evidence clearly demonstrating why it is not able to comply with the provisions of this law, just as the burden should be on small systems to show that they qualify for a small-system exception.

C. Multiple Channel Discounts May Be Allowed, As Long As There Is No Discrimination Against Basic-Only Subscribers.

A number of commenters have stated that the provision does not prevent cable operators from offering discounts for the purchase of multiple channel packages or from marketing such packages.¹⁰ USA Networks/ESPN has urged the FCC not to limit the ability of cable operators to offer inducements or discounts to subscribers who elect to take expanded basic or other intermediate service packages as well as premium services.¹¹ The Local Governments believe that discounts and packaging are permissible only if subscribers to basic-only service are offered the same packaging, pricing, and discounts as customers who also subscribe to other tiers of service such as expanded basic. Allowing subscribers to other tiers to receive more favorable prices or terms for premium services than are offered to basic-only subscribers would be in direct conflict with the buy-through provision, which states explicitly that cable operators may not discriminate as

¹⁰ See, e.g., comments of USA Networks and ESPN, Inc., filed January 13, 1993; Cablevision Systems Corp., filed January 13, 1993; and Viacom International Inc., filed January 13, 1993.

¹¹ Comments of USA Networks and ESPN, Inc., filed January 13, 1993.

to rates charged for programming offered on a per program or per channel basis. Cable operators may offer program packages and discounts, but all such offers must be made on the same terms to all subscribers.

Further, the Local Governments disagree with the comments of Cablevision Systems Corp., which states that only "unreasonable" price discrimination is prohibited by the statute. The statute very clearly states that "a cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis." There is no ambiguity in this requirement. All price discrimination is prohibited.

III. CONCLUSION

The buy through provision provides consumers with needed flexibility in purchasing programming services. The statute contemplates that consumers will be able to buy cable services that they want without having to pay for programming that they do not desire. The buy through provision is an integral part of the consumer protection scheme of the 1992 Act, and should not be gutted by allowing cable operators to have liberal and unnecessary exceptions and waivers from the provision's requirements. As stated in their comments, the Local

Governments believe that the tier buy through prohibition should be applied to include the overwhelming majority of cable systems, because the technology is in place or exists that would allow most systems to comply at a reasonable cost. The FCC should recognize that such technology is not limited to converters and trapping systems, but can include other technologies such as decoders that are compatible with cable-ready television sets. Further, operators' protests regarding the cost of compliance ring hollow. The cost of providing converters is relatively low, especially in light of the benefit to consumers provided by these devices. Further, to the extent that costs exist, they will likely be passed on by cable operators under the rate regulation provisions of the 1992 Act. In addition, while Local Governments recognize that there may be benefits associated with program packages and discounts, the statute explicitly requires that all such offers must be made available on the same prices, terms, and conditions to all subscribers.

Respectfully submitted,

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